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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 221

HUBERT RAY STIDHAM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1-2
Question Presented	2
Constitutional Provisions Involved	2-3
Statutes Involved	3
Argument	3-8
Conclusion	9
Certificate of Service	10

TABLE OF CASES

	Page
Blankenship v. Commonwealth (Va. 1952) 193 Va. 587, 70 S.E. 2d 335 at 338	5
Bruton v. United States (1968) —— US ——, 20 L.Ed 2d 476, 88 S.Ct. 1620	6
Clemmons v. State (Fla. 1901) 43 Fla. 200, 30 So. 699	5
DeStefano v. Woods (1968) —— US ——, 20 L.Ed 2d 1308, 88 S.Ct. ——,	4
Duncan v. Louisiana (1968) 391 US 145, 20 L.Ed 2d 491, 88 S.Ct. 1444	4
Garner v. Louisiana (1961) 368 US 157, 7 L.Ed 2d 207, 82 S.Ct 248	6
Jackson v. Denno (1964) 378 US 368, 12 L.Ed 2d 908, 84 S.Ct 1774	6
Johnson v. State (Fla. 1908) 46 So. 174	5
McCoy v. State (Fla. 1898) 40 Fla. 494, 24 So. 485 at 488	5-6
Purkhiser v. State (Fla. 1968) 210 So.2d 448	7, 8
State v. McQuerry (Mo. 1966) 406 S.W. 2d 624 at 627	5
Wilson v. State (Fla. App. 1965) 171 So.2d 903 at 905	3

CONSTITUTIONAL PROVISIONS

7th Amendment, Constitution of the United States	2, 4

FLORIDA STATUTES

Section 919.14, Fla. Stat.	3

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OPINIONS BELOW

Denial of Certiorari by the Florida Supreme Court is reported at 210 So. 2d 223.

JURISDICTION

This Court is without jurisdiction to consider this Petition for Writ of Certiorari because the Petition to Extend Time

for Filing was not timely filed. The decision of the Florida Supreme Court became final on February 14, 1968. The time for filing Petition for Writ of Certiorari or Petition for Extension of Time expired on May 14, 1968, pursuant to Rule 22.1 of this Court. The Petition to Extend Time for Filing was filed on May 22, 1968, and was granted with the express provision that this Court reserved the right to determine that the application had not been timely filed. As Rule 34.2 of this Court requires that said application for extension of time must be filed before the ninety day period has expired, said application was not timely filed and this Court is without jurisdiction to consider the instant Petition for Writ of Certiorari.

Further, the Extension of Time granted was only until June 15, 1968, yet the Petition for Writ of Certiorari was not filed until June 22, 1968.

QUESTION PRESENTED

WHETHER AN ACCUSED IS DENIED HIS RIGHT TO TRIAL BY JURY WHEN A JURY WHICH AGREES THAT THE ACCUSED IS GUILTY OF AN UNLAWFUL HOMICIDE IS PERMITTED TO MITIGATE THE DEGREE OF GUILT?

CONSTITUTIONAL PROVISIONS INVOLVED

The seventh Amendment to the Constitution of the United States, which provides as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

is not adequately set out in the Petition for Writ of Certiorari.

STATUTES INVOLVED

Section 919.14, Fla. Stat., provides as follows:

> "If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

ARGUMENT

AN ACCUSED IS NOT DENIED HIS RIGHT TO TRIAL BY JURY WHEN A JURY WHICH AGREES THAT THE ACCUSED IS GUILTY OF AN UNLAWFUL HOMICIDE IS PERMITTED TO MITIGATE THE DEGREE OF GUILT.

Petitioner alleges that his right to jury trial was infringed upon by the District Court of Appeal, Fourth District, because that court affirmed his conviction for third degree murder on the basis that the evidence would support a verdict of guilty of second degree murder. Obviously, Petitioner did receive a trial by jury, and it is he who sought to overturn the verdict.

Pursuant to Section 919.14, Fla. Stat., the trial court had no alternative save to instruct the jury regarding each degree of murder and to give the jurors the option to determine the degree, *Wilson v. State* (Fla. App. 1965) 171 So. 2d 903 at 905.

It appears that Petitioner's real challenge is to the constitutionality of this statute. He says he raised a federal question in the State Courts, yet he reserved his challenge until after the jury had been instructed, after arguments had been presented to the District Court of Appeal, even though the State's position was clear, and until after the appellate court had ruled. It is respectfully suggested that Petitioner did not properly present his federal question in the State courts.

In any event, Petitioner claims violation of his federal right to jury trial under the Sixth Amendment. The Sixth Amendment guarantee of a jury trial was first held applicable to the states through the Fourteenth Amendment in *Duncan v. Louisiana* (1968) 391 US 145, 20 L.Ed. 2d 491, 88 S.Ct. 1444. That decision does not apply to trials commencing prior to May 20, 1968, *DeStefano v. Woods* (1968) ____ U.S. ____, 20 L.Ed. 1308, 88 S.Ct. ____. Therefore, assuming arguendo that some violation of the right to jury trial occurred, no federal question is presented by that allegation.

Petitioner suggests that the Seventh Amendment, which has never been made applicable to the states through the Fourteenth, restricts appellate tampering with issues tried by jury. This would hardly be an appropriate case for an initial application of the Seventh to the states, since by its terms it applies only to civil cases involving money claims.

In affirming Petitioner's conviction, the District Court of Appeal, Fourth District, did nothing more than to apply the well established Florida rule that a person found guilty of an unlawful homicide may not complain that there is no evidence

of the degree of guilt assessed where a higher degree of guilt could have been assessed by the jury. The rule is enunciated in *Johnson v. State* (Fla. 1908) 46 So.174, and *Clemmons v. State* (Fla. 1901) 43 Fla. 200, 30 So.699. The rule is not unique to Florida, see e.g., *Blankenship v. Commonwealth* (Va. 1952) 193 Va. 587, 70 S.E. 2d 335 at 338, *State v. McQuerry* (Mo. 1966) 406 S.W. 2d 624 at 627.

The reason for this rule is well expressed in *McCoy v. State* (Fla. 1898) 40 Fla. 494, 24 So.485 at 488, where the court stated:

> "The jury is required to determine whether defendant has committed an unlawful homicide, and, if so, to declare by their verdict what degree thereof. They should truly find that degree, and that only, which, under the law, is applicable to the proven facts; and if they err in this, and injury results to the defendant, he is entitled to a new trial, or to a reversal of the judgment on appeal. It often happens, however, that juries, through sympathy, inadvertence, misapprehension, failure to properly discriminate or by reason of a desire to mitigate punishment, or from various other causes, do not truly ascertain by their verdict the degree of unlawful homicide of which the defendant, under the law, is guilty; and in all such cases the question arises whether the defendant is entitled to a new trial because of such error. Whenever the jury assign his offense to that class or degree carrying a heavier punishment or greater moral turpitude than the one to which, under the facts, it should have been assigned, the answer is plain. The injury to defendant being apparent, the verdict ought not to stand. When, however, the verdict assigns the defendant's offense to that degree or class where the moral turpitude is no greater, and the punishment is less, than it would have been had the verdict specified the proper degree or

class of the offense, he is not injured, but is benefited, by such error; and there is no reason why he should derive a further benefit from an error in his favor."

Thus, the rule recognizes that juries do not always follow the instructions they are given. This rule is designed to assure that though a jury be instructed that it should find the accused guilty if the State proves its case, that the jury will not refuse to follow this instruction because of the high price the accused might have to pay, but may mitigate to a degree of guilt more acceptable to them. This Court has had occasion of late to recognize that juries do not always follow instructions designed to protect the accused, in *Jackson v. Denno* (1964) 378 US 368, 12 L.Ed. 2d 908, 84 S.Ct. 1774, and *Bruton v. United States* (1968) ____ U.S. ____, 20 L.Ed. 2d 476, 88 S.Ct. 1620. This Court should also be willing to recognize that the jury does not always follow instructions given on behalf of the State. When a jury finds the accused guilty, but mitigates his degree of guilt, the accused should not be permitted to take advantage of the tenderness of the jurors beyond the boon already granted.

Though Petitioner claims a violation of his right to jury trial, a careful reading of his argument seems to reflect that he is really challenging the sufficiency of the evidence to sustain his conviction. Sufficiency of the evidence is not a federal question unless there is no evidence of guilt, in which case due process is violated, *Garner v. Louisiana* (1961) 368 US 157, 7 L.Ed. 2d 207, 82 S.Ct. 248.

Petitioner's challenge to the sufficiency of the evidence is invalid. He claims that there was no evidence that he and his

colleagues acted with depraved minds, yet it is difficult to comprehend what sort of reasoning could lead sixteen people, armed with two guns, an axe, a baseball bat, and a billy club and a tire iron to go out to a Puerto Rican labor camp "to assure a fair fight." Not content to lend his person as a bodyguard and his gun, Petitioner and his co-defendants went up to the house. Petitioner told Purkhiser an occupant was armed, knowing full well that Purkhiser had his gun. There can be no doubt that an unlawful homicide occurred and Petitioner aided and abetted in the crime.

Petitioner has contended at all times that there was no possible way for him to be convicted of murder in the third degree on the evidence. Surely he cannot doubt that he was really believed guilty of second degree murder, but the degree of guilt was mitigated to third degree murder. Nor would this be surprising. Though Petitioner does not seem a person likely to attract jury sympathy, it cannot be doubted that he and his companions did not intend the tragic results of their efforts that night. The jury could well have felt that some mercy should be shown to one so young who was, to some extent, the victim of circumstances he helped set in motion but could not fully control.

Petitioner seeks comfort in the decision of the Florida Supreme Court in *Purkhiser v. State* (Fla. 1968) 210 So. 2d 448. Though that case arose out of the same factual situation, it is evident that it was an entirely separate case. The evidence admitted at Purkhiser's trial obviously would not be exactly the same as that admitted at the instant trial.

Assuming there were some relevancy to *Purkhiser v. State*, supra, it cannot avail Petitioner. Actually the Supreme Court of Florida did nothing more than to direct a verdict of not guilty as to the charge of first degree murder. They did not remand for a new trial, but rather, remanded for sentence on second degree murder. Inasmuch as Petitioner and his co-defendants were charged with aiding and abetting Purkhiser, they should obviously be guilty of the same crime as he was. The only difference is that the trial judge directed the verdict of not guilty as to first degree murder as to Petitioner, while the Supreme Court of Florida had to do so for Purkhiser.

CONCLUSION

It is respectfully suggested that there is not really any federal question presented here. Petitioner claims that his right to jury trial was infringed upon, yet, he seeks to challenge the results of his jury trial. His conviction constitutes a mitigation as to degree of guilt following an agreement of the jury on his guilt. This is not an infringement of his right to trial by jury.

Petitioner's effort to challenge the sufficiency of the evidence to sustain his conviction does not raise a federal question and even if it did, his contention would fail because the evidence is sufficient to sustain his conviction viewed in the light of the mitigation as to the degree of guilt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Florida and Fourth District Court of Appeal of Florida, was furnished Honorable John M. McCants, 301 Blount Building, Fort Lauderdale, Florida 33301, and Honorable Neal F. Rutledge, 601 Flagler Federal Building, 111 Northeast First Street, Miami, Florida 33132, this _____ day of _____ 1968.

_____

CHARLES W. MUSGROVE

of Counsel